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NO. ————

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

ROBERT J. SIVALLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Robert J. Sivalls prays that a writ of certiorari issue to review the judgment entered in this case on July 10, 1953, by the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The District Court promulgated its findings of fact and conclusions of law, not officially reported, on May 3, 1953 (R. 18-22). The opinion of the Court of Appeals (R. 78-83) is reported at 205 F. 2d 444.

Jurisdiction

The judgment of the Court of Appeals was entered on July 10, 1953. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, amended by 43 Stat., 938 (U.S.C. Title 28, Section 347).

Question Presented

Whether the Court below erred in holding that Petitioner, Robert J. Sivalls, was not entitled to the benefits of the community property laws of Texas in determining his net taxable income and income tax liability for the years 1943 and 1944.

Statutes Involved

Internal Revenue Code:

Sec. 11 (as amended by Sec. 3 of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 213).

NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 3 per centum (this figure before this amendment was 6 per centum) of the amount of

the net income in excess of the credits against net income provided in section 25 (a).

* * * *

(26 U.S.C. 1946 ed., Sec. 11)

SEC. 12. SURTAX ON INDIVIDUALS.

* * * *

(b) (as amended by Sec. 101 of the Revenue Act of 1941, c. 412, 55 Stat. 687) *Rates of Surtax.*— There shall be levied, collected, and paid for each taxable year upon the surtax net income of every individual the surtax shown in the following table:

* * * *

(26 U.S.C. 1946 ed., Sec. 12.)

Note:

The foregoing statutes must be read and applied in the light of the following settled principles of the law of Federal income taxation, to-wit:

(a) Married persons domiciled in the State of Texas are each entitled to file a Federal income tax return in which each of them is required to return for taxation only his or her community one-half of the aggregate

community income realized by them within any given tax year.[1]

(b) The interests of spouses in movables (including cash or the equivalent representing income received during marriage) is determined by the law of the domicile of the parties when such movables, i.e., income, are acquired.[2]

(c) Under the laws of the State of Texas, compensation for personal services,[3] dividends from separately owned stocks,[4] and interest from separately owned notes and bonds[5] constitute the community property (and therefore the community income) of married persons domiciled in Texas.

Statement

Robert J. Sivalls was born in what is now Bartlesville, Oklahoma, and resided there until his education was completed. Upon completion of his education (about 1930), he entered the employ of Black, Sivalls, and Bryson, Inc., a corporation operating in several

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[1] *Hopkins, Collector of Internal Revenue,* v. *C. W. Bacon,* 282 U.S. 122.

[2] *Gladys C. Porter* v. *Commissioner of Internal Revenue,* 2 TC 1244; aff'd. CA-5th (1945) 48 F. 2d 566.

[3] *Speer—Law of marital rights in Texas*—3rd Ed., Sec. 361.

[4] *Scofield, Collector of Internal Revenue,* v. *Weiss,* CA-5th (1942) 131 F. 2d 631, 632.

[5] *Braden v. Gose,* 57 Texas, 37; *Willcutt* v. *Willcutt,* 278 S.W. 236.

states, and left his home in Oklahoma with no intention of ever returning there to live (R. 39). His Mother was then dead (she died in 1915) and his Father passed away in 1937 (R. 27).

Upon going to work for Black, Sivalls, and Bryson, Inc., Sivalls was frequently transferred to various points in its territory where his services were needed, and for some years from and after 1930 he had no fixed place of abode, and no home, in the usual sense of that word.

In the spring of 1942, while in the employ of Black, Sivalls, and Bryson, Inc., and stationed in Jackson, Mississippi, Sivalls was instructed by his employer to close its Jackson, Mississippi office and to proceed to Shreveport, Louisiana, for temporary duty. When finished at Shreveport, he was to go to Kilgore, Texas, on another temporary assignment and, when this was completed, was to proceed to Fort Worth, Texas, for permanent duty.

In due course he arrived at Kilgore, Texas. After residing and working there for about two weeks, Sivalls was notified by the military authorities to report for duty as a commissioned officer in the United States Army at Biloxi, Missippi. When he left Kilgore, Texas, to enter military service, it was Sivalls' intention to return to Texas at the conclusion of such military service, and to thereafter reside permanently in Fort Worth, Texas (R. 19). He consumated this intention by returning to Texas when discharged from mili-

tary service in 1946, and has resided in Fort Worth, Texas, ever since.

While serving in the armed forces, Sivalls was married to Myrtle Braswell at Minden, Louisiana, on September 1, 1942. At the time of their marriage, Miss Braswell was living in New London, Texas, and teaching school at that place. Prior to their marriage, Sivalls and Miss Braswell agreed that they would make their permanent home in Fort Worth, Texas.

During the period he was working for Black, Sivalls, and Bryson, Inc., and while serving in the armed forces, Sivalls was called upon from time to time to state his "home address" and his "permanent mailing address". Not having a home in the sense that most people did, these were always difficult questions for Sivalls to answer (R. 50). Whenever required to furnish a "permanent mailing address", it was his custom to give the postoffice box number of his employer, Black, Sivalls, and Bryson in Oklahoma City, Oklahoma. Sivalls had never lived in Oklahoma City, Oklahoma. Whenever required to state his "home address", he adopted the practice of giving the address where he had storage facilities available to him in Bartlesville, Oklahoma, although he hadn't lived there for many years (R. 50), and when he left there in the 1930's (R. 39), it was with the intention of never returning there to live, nor did he ever return there to live.

Following their marriage in September, 1942, Sivalls and his wife lived at or near the various military

camps where he was stationed until he was sent overseas. While he was overseas, she alternately visited her brother in Louisiana, and her sister in Texas. When Sivalls returned from overseas, and was discharged from the Army about June, 1946, he and Mrs. Sivalls traveled around and visited relatives until his terminal leave expired. Thereafter they proceeded to Fort Worth, Texas, where he resumed his employment with Black, Sivalls, and Bryson, Inc. He and his wife have at all times since resided in Fort Worth, Texas, first living for some six months in a hotel, thereafter in an apartment, when one became available, and finally acquiring a house (R. 19-20).

As he had a right to do, Sivalls elected not to file his income tax returns for the years 1943 and 1944 until after he returned from overseas. In 1946, he filed his returns for those years and reported as community property and income, his income for the years 1943 and 1944 which, aside from compensation received by him for personal services, viz., his Army pay, consisted entirely of dividends and interest from stocks, bonds, and notes owned at the time of his marriage. The Commissioner of Internal Revenue disallowed Sivalls' claim for a community division of income on the basis that he was not domiciled in Texas during the taxable years, and determined that his entire income was taxable to him individually. The additional tax thus assessed and collected, together with interest, is the amount sued for.

The trial court found: "(10) that, although taxpayer intended to make his domicile in *Fort Worth,*[6] Texas, he did not couple said intent with the necessary residence until July, 1946." Based on this finding, the District Court concluded as a matter of law: That Sivalls was not domiciled in *Texas* during the years in question; that he was not entitled to the tax benefits of the community property laws of that state; and was not entitled to the refund sued for (R. 21, 22).

The Court of Appeals affirmed, holding: "The trial court found that although Sivalls intended to make his residence in *Fort Worth,*[7] Texas, he did not couple this intent with actual residence *there*[7] until July, 1946, and concluded that he was not domiciled in Texas during the years in question; that he was not entitled to the tax benefits of the community property laws of that state; and was not entitled to the refund sued for. These legal conclusions were properly applied to the facts."

Specifications Of Errors To Be Urged

The Court of Appeals erred:

(1) In holding: that Petitioner, Robert J. Sivalls, was not domiciled in the State of Texas during the taxable years 1943 and 1944;

(2) That he was not entitled to the benefits of the community property laws of Texas for said years;

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[6]Emphasis supplied.

[7]Emphasis supplied.

(3) That Sivalls was required to report all income he realized in 1943 and 1944 as his sole income, and was not entitled to divide said income with his wife, and that because of this, he made no overpayments of income tax for the years 1943 and 1944; and

(4) In failing to hold and determine: that Sivalls was domiciled in the State of Texas throughout the taxable years 1943 and 1944; that he was entitled to the benefits of the community property laws of the State of Texas for said taxable years; that under the community property laws of Texas only one-half of the aggregate net taxable income of Sivalls and his wife was the property of Sivalls and taxable to him, and that, because he was required to pay tax on the whole of the community income of himself and his wife, Sivalls overpaid his 1943 and 1944 income tax and interest by not less than $14,797.12, which he is entitled to have refunded to him with interest as provided by law, and costs of suit.

Reasons For Granting The Writ

The writ should be granted for the following reasons:

The decision of the Court of Appeals was wrong. It turned upon the erroneous concurrence by that Court in the view of the District Court that, as a matter of law, an individual claiming to have abandoned his domicile of origin and to have acquired a domicile of choice in another state must establish not only that he

had permanently abandoned his domicile of origin, but that he had acquired a domicile of choice by selecting and occupying *specific lodgings* (viz.: "a location, a house, or a room, or some domicile" (R. 66)) in a *particular town or city* in the new state. The Circuit Court was of opinion that it was not sufficient for such individual to show actual physical presence in the new state, accompanied by the concurrent intent to thenceforth reside permanently in the new state.

The legal conclusions thus reached by the Circuit Court and applied in its decision below directly contravene principles of law announced and applied by this Court in *Morris* v. *Gilmer*, 129 U. S. 315, and in *Texas* v. *Florida*, 306 U. S. 398 and are also contrary to the holdings of the Court of Appeals for the Fifth Circuit, itself, in *Paudler* v. *Paudler*, 185 F. 2d 902, 903. Moreover, the decision of the Court of Appeals is contrary to the result reached by the Supreme Court of Texas, Petitioner's domicile of choice, in *State of Texas* v. *Elizabeth Barrow*, 14 Texas 179.

Unless set aside by this Court, the decision of the Court of Appeals will substantially undermine established principles of the common law relating to the law of domicile, as ascertained and restated in the Restatement of the Law (Conflict of Laws) compiled by the American Law Institute after years of painstaking research and editorial collaboration by leading members of the American Bar, and distinguished American jurists, who contributed generously of their time and labor, as a public service to the citizenry, the legal pro-

fession and the bench, in the preparation of the Restatement of the Conflict of Laws.

Because of widespread population shifts due to World War II and the late Korean conflict, and the dispersal of industry occasioned thereby, the question of domicile, as it affects Federal income and estate tax liability, is of material importance to a large segment of U. S. taxpayers.

1. The Parties conceded below that the fundamental question involved in the case at bar was one within the realm of the Conflict of Laws. It was: are the property laws of Texas, or the property laws of Oklahoma, or some other non-community property state, to be resorted to in order to determine who owned, and was therefore liable for Federal income tax on, the moneys representing the income derived within the taxable years 1943 and 1944 from stocks, bonds, and notes owned by Robert J. Sivalls as his separate property, and from compensation received by him for personal services.

The Parties further agreed (with one reservation by Petitioner) that property rights in movables (stocks, bonds and notes), and in the income therefrom, and in moneys received as compensation for personal services, are governed by the laws of the state of the recipient's domicile when such moneys are received and that, therefore, unless (as alternatively contended by Petitioner) the issue was governed by *State of Texas* v. *Elizabeth Barrow*, 14 Texas 179, which will be dis-

cussed later, the question whether Robert J. Sivalls was taxable on the whole of the income involved in this proceeding (as contended by the Government), or on his community one-half of the same only (as contended by Sivalls) depended solely on whether, during the taxable years involved, Sivalls had his domicile in the State of Texas or, in contemplation of law, his domicile during this period must be deemed to have been in the State of Oklahoma, a non-community property state.

The District Court and the Court of Appeals concurred with the Parties to the extent that neither Court questioned that if Petitioner was domiciled in the State of Texas throughout the period material to this proceeding, he was entitled to have refunded to him in full the overpayments of 1943 and 1944 income tax and interest alleged in the Complaint filed in the District Court. Neither Court considered or discussed the applicability of *State of Texas* v. *Elizabeth Barrow*, *supra.*

The District Court found from all of the evidence (R. 19): that about the middle of 1942, Sivalls had proceeded to and was physically present in the State of Texas with the view of ultimately settling in the City of Fort Worth, Texas; that after residing and working in Kilgore, Texas, for about two weeks (while en route to Fort Worth, Texas) he was called into military service; and that when he entered military service (from Kilgore, Texas) it was Sivalls' intention to return to Texas at the conclusion of his military

service and to reside in Fort Worth, Texas, from that time on.

It inescapably follows from these findings of the trial court: (a) that immediately before Sivalls entered military service (in June, 1942) from Kilgore, Texas, (R. 33) he was physically present in the State of Texas, and; (b) he then intended to make that state his permanent home. Accordingly, the physical presence and *animus manendi* required instantly *(Morris* v. *Gilmer*, 129 U.S. 315; *Paudler* v. *Paudler*, 109 F. 2d 902, 903) to transfer his domicile from its former situs, (whatever that might be) to the State of Texas, existed concurrently not later than June, 1942. Under the uncontroverted facts in the case at bar, and the findings of the District Court, it follows that from and after June, 1942, Petitioner was domiciled in the State of Texas, although he did not become domiciled in any city, town, or county of that state (a fact immaterial to the decision of this case) until he settled in Fort Worth, Texas, in 1946 following his return from military service. Compare: American Law Institute's Restatement of the Law—Conflict of Laws—Chapter 2, Illustrations 3 and 5, Sections 11 and 16, set out in the Appendix at Pages 17 to 21, infra.

Petitioner's departure for temporary military service, with the express intent of returning to Texas as soon as such service was concluded, did not in any wise impair the validity of his newly acquired domicile, viz., the State of Texas, *Gallagher* v. *Gallagher*, 214 S. W. 516.

2. If and to the extent the Court of Appeals, in affirming the District Court, relied upon Petitioner's answers to sundry questionaires put to him subsequent to June, 1942, by military authorities and a marriage bureau clerk, respectively, concerning his "home address" and his "permanent mailing address" as tending to defer the time Petitioner first effectively abandoned his domicile of origin the Court of Appeals: (a) invaded the province of the trial court, which made no findings of lack of timely *intent* by Petitioner to abandon his domicile of origin, but bottomed its decision solely on the failure of Petitioner to reach *Fort Worth*, Texas, within the taxable years involved, and; (b) applied legal principles contrary to express holdings of this Court. In *Texas* v. *Florida*, 306 U. S. 398, 425, this Court held that repeated declarations, deliberately and designedly made, that one's home and legal residence is in a state where one was once domiciled but had left with the intention of never returning there to live could not supply the *fact* of residence necessary to preserve domicile at its former situs. Such being the law, it would be error to give any weight whatever to the circumstance that while in military service Petitioner (a person without a fixed place of abode), not with an deliberate purpose or design, but solely because he was at a complete loss how to otherwise answer such questionaires, on an occasion or two gave as his "home address" the location in Oklahoma where storage facilities were available to him, and as his "permanent mailing address" the postoffice box of his corporate employer, located in a city in Oklahoma where he had never lived.

3. *State of Texas* v. *Elizabeth Barrow*, 14 Texas 179, holds that when a man domiciled in one state marries a woman domiciled in a different state, the contracting parties may, by agreement, fix as their matrimonial domicile the state of origin of either of them, or another and different state, and that where there is an express agreement fixing their matrimonial domicile the rights of the contracting parties in property acquired during marriage are to be determined under the laws of the state selected as the situs of the matrimonial domicile. Since the uncontroverted evidence in this proceeding establishes, and the trial court found, that Sivalls and his wife, prior to their marriage on September 1, 1942, agreed upon the State of Texas as their matrimonial domicile (R. 20), this is a further reason why the Circuit Court erred in denying Petitioner the benefits of the community property laws of Texas with respect to his 1943 and 1944 income.

4. This Court judicially knows that the exigencies of World War II and of the late Korean conflict occasioned widespread population shifts due to the mass migration of civilian wage earners and their families as a result of the dispersal of industries in the interest of national defense and due to discharged military personnel settling in areas other than those from which they entered the service. Because of this, the question of domicile has become of material importance, and will continue to increase in importance, in many questions relating to Federal income, estate and gift taxes.

The decision below was wrong. In deciding the case as it did, the Court of Appeals went counter to decisions of this Court and its own decisions, ignored a decision of the Supreme Court of Texas settling the property rights on which a correct decision below necessarily turned, and its decision tends to undermine the results of the years of research and effort devoted to the American Law Institute's Restatement of the Conflict of Laws.

Conclusion

For the reason stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

American Law Institute—Restatement of the Law—Conflict of Laws

Chapter 1

Sec. 5: "The rules of Conflict of Laws are part of the law of each Common law state, and as such are as binding upon the courts as any other parts of the law of the state." (Ch. 1, Sec. 5, P. 9)

Chapter 2

Sec. 9: "Domicil is the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by the law." (Ch. 2, Sec. 9, P. 17)

Comment:

a. *"Domicil as a point of contact in the Conflict of Laws.* Domicil is not the only place with which a person has a connection for legal purposes. Domicil differs from such other places both in the nature of the connection and in the legal purposes for which such connection is important. Thus a person may be a "resident" or an "inhabitant" or a "citizen" of a place without being

domiciled therein, although such "residence," "inhabitancy" or "citizenship" may be significant for some legal purposes. Many legal questions depend upon domicil irrespective of residence, inhabitancy or citizenship. Jurisdiction, for example, often depends upon domicil and it is, therefore, necessary in order to determine questions of jurisdiction to establish the principles upon which domicil is based. The principal interests determined by a person's domicil concern: (a) status such as legitimacy, adoption and marriage; (b) the teransfer by act of law of a personal estate as a whole as, for instance, upon death; (c) *the incidence of personal taxes;* (d) judicial jurisdiction." (emphasis supplied)

b. "For the purpose of Conflict of Laws, it is important only to fix domicil within a state; but for other purposes of the law it may be necessary to fix it more definitely in a local subdivision of the state. A Conflict of Laws question, however, never involves the determination of domicil in a municipal subdivision of a state except in so far as such determination necessarily fixes the domicil of the person in question in that state. Domicil is usually fixed in a particular house; in which case it would also be fixed in the city, county, and state

which contain the house. It may not be possible to fix the domicil more definitely than in a city or a state, either because it has never been fixed definitely in a house or because it has once been so fixed and the house has been given up or destroyed."

Sec. 11: *One And Only One Domicil.*

"Every person has at all times one domicil, and no person has more than one domicil at a time."

Comment:

a. *Necessity of one and only one domicil.* "Since domicil is important for the reasons stated in Sec. 9, Comment a, it is essential that every person should have a domicil. In order that there shall be no conflict as to the law affecting his interests, the law provides that a person shall have a single domicil."

Illustrations: 1. "*A* is a wanderer, without a home; a domicil is assigned him by law."

Illustrations: 2 "*A* has two homes; the law determines which of them is his domicil."

b. *Necessity of domicil in town or city.* "A person does not always have a domicil in a

lesser political unit than a state. It may be that, at a given time, such person is not domiciled in any municipal subdivision of a state although he is domiciled within the state in question (See Sec. 9, Comment b)."

Illustration: 3. "*A* abandons his home and starts for California where he intends to make his home for the rest of his life. Upon arriving at Sacramento, he decides to go to Los Angeles to make his home. He dies before arriving in Los Angeles. *A* is domiciled in California but in no county or city in the state." (Ch. 2, Sec. 11, Pp. 23 and 24)

* * *

Sec. 14: *Domicil of Origin.*

"(1) The domicil of origin is the domicil assigned to every child at its birth." (Ch. 2, Sec. 14, p. 30)

* * *

Sec. 15: *Domicil of Choice.*

"(1) A domicil of choice is a domicil, acquired, through the exercise of his own will, by a person who is legally capable of

changing his domicil." (Ch. 2, Sec. 15, P. 32)

* * *

Sec. 16: *Requisite of Physical Presence.*

"To acquire a domicil of choice in a place, a person must be physically present there; but a home in a particular building is not necessary for the acquisition of a domicil." (Ch. 2, Sec. 16, P. 32)

* * *

Illustrations: * * * 5. "*A* leaves the state in which he has been domiciled, and comes to *X*, another state, intending to make a home in the state as soon as he finds a city therein which pleases him. He lives in hotels in various cities. The owner may be found to be domiciled in *X*." (Ch. 2, Sec. 16, Pp. 34 and 35)

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 392

ROBERT J. SIVALLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court (R. 63-66) is not officially reported. The opinion of the Court of Appeals (R. 77-80) is reported at 205 F. 2d 444.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1953 (R. 80). The petition for a writ of certiorari was filed on October 7, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether, on the evidence adduced, the Court of Appeals properly affirmed the District Court's decision that the taxpayer was not domiciled in the State of Texas during 1943 and 1944, the tax years in question, and was not, therefore, entitled to report his income for federal income tax purposes on the basis of the community property laws of that state.

STATUTE INVOLVED

Internal Revenue Code:

Sec. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 3 per centum [1] of the amount of the net income in excess of the credits against net income provided in section 25(a). * * *

* * * * *

(26 U.S.C. 1946 ed., 11.)

Sec. 12. SURTAX ON INDIVIDUALS.

* * * * *

(b) *Rates of Surtax.*—There shall be levied, collected, and paid for each taxable year upon the surtax net income of every individual the surtax shown in the following table:

* * * * *

(26 U.S.C. 1946 ed., 12.)

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[1] As amended by Section 102 of the Revenue Act of 1942, c. 619, 56 Stat. 798, the rate of tax under this section was six per cent for the year 1943.

STATEMENT

The pertinent facts in this case, as set forth in the District Court's findings of fact (R. 18-21) and oral opinion (R. 63-66), may be summarized as follows:

Robert J. Sivalls, the taxpayer, was born in the Indian territory, now the State of Oklahoma, and resided there, except for the time spent in college, until his education was completed. (R. 18.)

Upon completion of his education in the 1930's, taxpayer was employed by Black, Sivalls and Bryson, a corporation engaged in the manufacture, sale and servicing of oil well equipment and tanks operated in several states. Being then single, taxpayer was frequently transferred by his employer and sent to various points in its territory where his services were needed. (R. 18.)

During this period the taxpayer had no fixed place of abode. He had the use of storage in facilities in Bartlesville, Oklahoma, and, whenever required to furnish a permanent address, taxpayer designated as his "permanent mailing address" or his "permanent address" Post Office Box 1714, Oklahoma City, the post office box of his employer. (R. 18.)

In the spring of 1942 taxpayer was instructed by his employer to close its Jackson, Mississippi, office where he was then stationed and to proceed to Shreveport, Louisiana, for temporary duty. He was then to proceed to Kilgore, Texas, on another temporary assignment, and when completed to go from there to Fort Worth, Texas. (R. 19.)

The taxpayer had previously registered for the draft and had made an application for an officer's commission in the Armed Forces of the United States. After working in Kilgore, Texas, for two weeks, he was notified to report to Kessler Field, Biloxi, Mississippi, as a commissioned officer. When he entered military service, it was taxpayer's intention that, at the conclusion thereof, he would return to Texas and would thereafter reside permanently in Fort Worth. (R. 19.)

Prior to the date taxpayer entered the Armed Forces, he was engaged to be married to Miss Myrtle Braswell (R. 33). Miss Braswell, whose parents lived in Minden, Louisiana, was then teaching school in New London, Texas. While engaged and prior to their marriage, Mr. Sivalls and Miss Braswell agreed to make their marital domicile in Fort Worth, Texas. Taxpayer's employer agreed on or about the time of his marriage, and in conjunction therewith, to transfer taxpayer to Fort Worth, Texas. When married on September 1, 1942 (R. 34), taxpayer was a commissioned officer in the United States Army. At that time, taxpayer's employer agreed to transfer him to Fort Worth after completion of his military service. (R. 19-20.)

Following their marriage, the taxpayer and his wife lived at or in the vicinity of the various Army camps where taxpayer was stationed until he was sent overseas. During taxpayer's absence overseas, his wife alternately visited her brother in Louisiana and her married sister in Texas. (R. 20.)

The taxpayer returned from overseas and was

discharged from the military service about June 1946. After spending the period of his terminal leave visiting relatives, taxpayer and his wife proceeded to Fort Worth, where taxpayer resumed working for Black, Sivalls and Bryson. Taxpayer has at all times since resided in Fort Worth, Texas. (R. 20.)

On his marriage application filed in Minden, Oklahoma, taxpayer gave as his home address, Bartlesville, Oklahoma (R. 19). While the taxpayer was in the service, he located his home at Bartlesville, Oklahoma (R. 65). Upon termination of his military service, taxpayer gave as his home address at time of entry on duty, 709 Jonstone Avenue, Bartlesville, Oklahoma (R. 18-19). While in the service, the taxpayer maintained his bank account at Bartlesville and did his banking there (R. 65).

The taxpayer exercised the privilege afforded him by law and filed no income tax returns while he was in the Armed Forces and overseas. In 1946 he filed income tax returns for taxable years ending December 31, 1943, and 1944, on a community property basis under the laws of the State of Texas. The Commissioner disallowed the returns filed in this manner and assessed the taxpayer additional income taxes and interest for the years 1943 and 1944 in the total amount of $14,797.12 on the ground that the taxpayer was not entitled to divide his income with his wife in community property returns, it being the position of the Commissioner that the taxpayer was not domiciled in the State

of Texas during the years 1943 and 1944, and that his entire income was therefore taxable solely to him. (R. 20-21.) At the close of taxpayer's evidence, the District Court held that taxpayer's evidence was insufficient to show that he was domiciled in Texas during the tax years in question, and sustained the action of the Commissioner (R. 21-22). The Court of Appeals affirmed (R. 80).

ARGUMENT

1. This case turns on the factual question whether taxpayer was domiciled in the state of Texas during 1943 and 1944, the tax years involved. The District Court found that he was not so domiciled, and the Court of Appeals concurred in that finding. The settled rule of this Court makes concurrent findings of two courts below final here in the absence of exceptional error. *Comstock* v. *Group of Investors,* 335 U.S. 211, 214. Taxpayer has failed to demonstrate that exceptional error was committed.

Furthermore, under Section 12(d) of the Internal Revenue Code, as amended in 1948 (26 U.S.C. (Supp. V) 12(d)), a husband and wife may now divide their income for federal income tax purposes without regard to whether they are domiciled in a community property state. This, of course, greatly diminishes, if it does not entirely eliminate, the importance of the domicile question in connection with the computation of the federal income taxes of husbands and wives.

The above considerations make it clear that the

case presents no important question of law which warrants review by this Court.

2. Taxpayer's principal contention is, in effect, that the court below did not correctly apply the law of domicile by choice, recognized generally, and particularly in Texas, to the facts of his case (Pet. 10). The contention is untenable. In making this contention, taxpayer endeavors (Pet. 8-10) to construe the decision of the court below into a holding that a showing of actual physical presence in a given state, accompanied by a concurrent intention to reside thenceforth in that state, is insufficient to prove a domicile therein. It is plain from the language used by the court that such was not its holding in this case. After stating that the place of one's birth is his place of domicile until a new domicile has been acquired, the court said (R. 79), "The essentials of a domicile of choice are the *concurrence* of actual, physical presence at the new locality and the intention to there remain." [Emphasis supplied.] Thus, the court below both recognized and applied the well-established general doctrine of domicile of choice. What the court below actually held was (R. 79) that the necessary intention to remain which accompanies the physical presence in the new location must "relate to the present and not to the future." This holding is not without precedent. *Gates* v. *Commissioner,* 199 F. 2d 291, 294 (C.A. 10); *Gallagher* v. *Gallagher,* 214 S.W. 516 (Tex. Civ. Appls.); *Harral* v. *Harral,* 39 N.J. Eq. 279, 285; *Williams* v. *Williams,* 78 N.J. Eq. 13, 17. And it is in harmony with the decisions of this

Court. *Morris* v. *Gilmer,* 129 U.S. 315; *Texas* v. *Florida,* 306 U.S. 398.

3. Taxpayer contends (Pet. 15) that the decision of the court below is in conflict with the early decision of the Supreme Court of Texas in the case of *State* v. *Barrow,* 14 Tex. 179 (1855). The *Barrow* case is clearly distinguishable from the case at bar. In that case, a husband and wife who had been domiciled in Mississippi visited in Tennessee while enroute to Texas where they intended to live permanently. While so visiting in Tennessee, the wife received a gift of property, and the question presented was whether that property became the property of the husband under the law of Tennessee or whether it was the separate property of the wife under the law of Texas. The plaintiff disavowed any claim that the law of Mississippi was applicable. The court clearly indicated that in the absence of the disavowal by the plaintiff the law of Mississippi would be applicable, on the ground that since the husband and wife had not yet acquired a domicile, *facto et animo,* in Texas they still retained their Mississippi domicile. The court, however, went on to hold that, as between the law of Tennessee and the law of Texas, the Texas law should be applied, despite the fact that the husband and wife had not yet reached Texas when the property was received by the wife. In so holding, the court made a number of statements, clearly in the nature of dicta, somewhat at odds with the general rule that physical presence and intention to remain in a

new location must concur before a new domicile can be established therein.

It will be observed that both the earlier and later decisions of the Texas courts on the question of domicile adhere to the dominant rule that physical presence accompanied by intention to remain is essential to the creation of a new domicile by choice. See, *e.g.*, *McIntyre* v. *Chappell*, 4 Tex. 187 (1849); *Gallagher* v. *Gallagher*, 214 S.W. 516, 518 (Tex. Civ. Appls. (1919)); *Struble* v. *Struble*, 177 S.W. 2d 279, 283 (Tex. Civ. Appls. (1943)); see also *Pettaway* v. *Pettaway*, 177 S.W. 2d 285 (Tex. Civ. Appls. (1943)); *Wells* v. *Wells*, 177 S.W. 2d 348, 349 (Tex. Civ. Appls. (1943)); *Randle* v. *Randle*, 178 S.W. 2d 570 (Tex. Civ. Appls. (1944)); *Commercial Credit Corp.* v. *Smith*, 187 S.W. 2d 363 (Tex. Sup. Ct. (1945)); *Pippin* v. *Pippin*, 193 S.W. 2d 236 (Tex. Civ. Appls. (1946)); *Hogue* v. *Hogue*, 242 S.W. 2d 673 (Tex. Civ. Appls. (1951)).

In the circumstances, the decision of the court below is not at variance with the established doctrines of the law of domicile, which doctrines are applicable in Texas.

CONCLUSION

The decision of the court below is correct, and further review is not called for. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 392

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1953

ROBERT J. SIVALLS, Petitioner

Petitioner

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF CERTIORARI

Preliminary Statement

Because we believe that the brief for the United States in opposition to the granting of certiorari in the case at bar over-simplifies the issues involved in this case, and, futher, that it does not accurately state the true holding of the Court in several of the authorities cited in the brief in opposition, we reluctantly feel it our duty to burden this Court with the reply argument hereinafter set out.

Reply Argument

1. Contrary to the assertions made in the brief in opposition, (Br., pg. 6), this case does not turn solely on a purely *factual* question, viz, whether taxpayer was domiciled in the State of Texas during 1943 and 1944 (the tax years involved), because a question of domicile is never purely factual[1]. Nor did the District Court and the Court of Appeals concur in their findings of fact below. This case turns on: (a) the mixed question of law and fact, whether taxpayer was domiciled in the State of Texas during the tax years involved[1], and (b) on whether, irrespective of technical domocile, the rights of taxpayer and his wife in property acquired subsequent to their marriage are to be governed by the laws of the state (Texas) selected by them before marriage to be their matrimonial domicile, under the principle that rights under a contract, be it a marriage contract, or otherwise, are to be determined under the laws of the place where the contract is to be performed.

Did the District Court and the Court of Appeals below make concurrent findings of *fact*, as distinguished from conclusions of law? They did not. The District Court found (R. 21) that, although taxpayer intended to make his domicile in *Fort Worth*, Texas, he did not couple such intent with the necessary residence *there* (R. 66) until July, 1946. Under its view of the applicable law, to-wit—that residence in a

[1]Any question of domicile always combines questions both of fact and of law. *Shilkret* v. *Helvering*, 138 F. 2d 925, 927.

specific dwelling in a particular town or city of a state was necessary to establish a domicile of choice (R. 66)[2]—the District Court did not rule on whether taxpayer's physical presence in the State of Texas with the intent of making that *state* his permanent home was effective to establish his domicile in *Texas* (all that was required for the purposes of this case) at all times from and after June, 1942.

The Court of Appeals, recognizing the infirmities in the District Court's opinion and decision when tested in the light of the District Court's ultimate findings of fact, reviewed the evidence for itself and reached the conclusion that while taxpayer intended in 1942 to establish a domicile of choice in Texas, such intention related to the "future" (R. 79). This finding cannot be reconciled with the finding of the District Court (cf. Brief for the United States in Opposition, page 4) that:

> "After working in Kilgore, Texas, for two weeks, he, (Taxpayer), was notified to report to Kessler Field, Biloxi, Mississippi, as a commissioned officer. *When he entered military service*, it was taxpayer's intention that, at the conclusion thereof, he would return to Texas and would thereafter reside permanently in Fort Worth. (R.19.)" (Matter in parentheses and emphasis supplied).

The District Court thus found: that taxpayer had resided and worked in *Texas* for two weeks before he

[2]To the contra, see petition for certioraia, pp. 13 and 18.

was ordered into military service, and that when he left Texas for military service, it was his *then* (and not a future) intention to return to Texas when his military service was concluded, and reside permanently in Texas, more specifically in the City of Fort Worth in that state.

Thus, we have here no concurrent findings of *fact* by the two Courts below, but divergent findings of fact made by the two Courts below on the same testimony and evidence. The Court of Appeals invaded the province of the District Court in making independent findings of its own[3]. For the reasons set out in the petition for certiorari, under the findings of fact made by the District Court, the decision of the Court of Appeals, as well as the decision of the District Court, was wrong.

Comstock v. *Group of Investors*, 335 U.S. 211, 214, cited in the brief in opposition (Brief, pg. 6) is wholly inapplicable. In that case, while the Petitioner assured the Court that there was no factual controversy before the Court, and that the *facts* found by the lower courts might be assumed, much of the Petitioner's argument invited the Court to reach conclusions of fact from the voluminous record in the case contrary to those reached by the two Courts below, which this Court refused to do. It is clear that the rule of this Court making concurrent findings of two

[3]A Court of Appeals is without authority to weigh the evidence and to make its own findings; *McCaughn* v. *Real Estate Land Title and Trust Co., et al.*, 297 U.S. 606.

Courts below final in the absence of exceptional error relates wholly to concurrent findings of *fact*. We are certain that this Court does not consider itself bound by erroneous applications of legal principles by inferior Courts, however concurrently made. It is inconceivable that this Court would thus abdicate its appellate functions.

2. We agree with the Court of Appeals that (with the exceptions adverted to in *State* v. *Barrow*, 14 Tex. 179 (1855)) the necessary intention to remain, which accompanies physical presence in the new location (Brief in Opposition, pg. 7) must relate to the present and not to the future, in order to effect the present acquisition of a domicile of choice, but we respectfully assert that the record, and the findings of the District Court, establish that there was nothing "future" about taxpayer's intention to make the State of Texas his permanent home, when that intention was formed while taxpayer was physically present in the State of Texas in 1942. The District Court found that taxpayer had resided and worked in Texas for some two weeks early in 1942; that when he left the state under the compulsion of military orders, it was with the intention of returning to and living permanently in Texas, and that this he did as soon as released from the military compulsion that sent him elsewhere. This was not a "future" intention, but one entertained by taxpayer "when he entered military service" (from Texas) in 1942; see Record, pg. 19.

Had taxpayer not been called into the military service from Texas, where he was then physically present, before he had had the opportunity of selecting and occupying specific living quarters in Fort Worth, Texas (his ultimate destination within that state), this case would never have arisen. It seems to us unconscionable for our Government to assert, as grounds for retaining moneys illegally exacted as taxes, that taxpayer had not effectively established a domicile of choice in Texas solely because an intervening period of military service in his country's defense prevented him from proceeding, within the confines of the State of Texas, to the particular city within the state he had selected as his permanent home.

Gates v. *Commissioner*, 199 F. 2d 291; *Gallagher* v. *Gallagher*, 214 S.W. 516, and; *Morris v. Gilmer*, 129 U.S. 315, cited and relied upon by Respondent (Brief in Opposition, pg. 7) do not support Respondent's position in this case.

In *Gates* v. *Commissioner*, Supra, the finding was that Gates, while he accepted temporary employment in Louisiana for the purpose of gaining experience in his chosen field of work, at all times definitely intended to return to his domicile of origin when his purpose was accomplished. *Gallagher* v. *Gallagher*, Supra, involved a service man who claimed a secret intention, not expressed to anyone, of making his military post of duly his permanent domicile. In *Morris* v. *Gilmer*, Supra, Gilmer had left his domicile of origin and journeyed to another state for the sole purpose of

invoking the jurisdiction of the Federal Courts in a proposed lawsuit, all the while intending to return to his domicile of origin when his suit was concluded. All three of the cases just cited turned on the failure of proof of any bona fide intent at all to acquire a new domicile of choice. Another authority cited by Respondent under this subdivision of its argument, viz., *Texas* v. *Florida*, we have sufficiently discussed in our Opening Brief.

In the case at bar, the underlying facts are, that taxpayer left his domicile of origin in 1930 with no intention of ever returning thereto (R. 39). He was physically present in Texas in June, 1942, and intended that state to be his permanent residence. He has, in fact, lived in Texas at all times since, except when absent under the compulsion of military orders.

3. The opinion of the Supreme Court of Texas in the *State of Texas* v. *Barrow*, 14 Tex. 179 (1855), is not, as asserted by Appellee, replete with dicta, somewhat at odds with the general rule that the physical presence and intention to remain in a new location must concur before a new domicile can be established therein. This case was primarly cited and relied upon by Petitioner in support of the proposition that, even if Petitioner had failed effectively to establish a new domicile of choice in Texas prior to 1943 (and we respectfully assert that he had so established a domicile of choice), nevertheless, the property rights of taxpayer and his wife in property (dividends, interest, etc.) acquired in 1943 and 1944 were to be determined

under the laws of Texas because of their premarital agreement that Texas was to be their matrimonial domicile (R. 20). Thus, *State v. Barrow*, Supra, was cited mainly as presenting additional and cogent reasons why the decisions below were wrong. While the actual issue before the Supreme Court of Texas in *State* v. *Barrow*, Supra, concerned property rights acquired by married persons in transitu from their domicile of origin to a new domicile of choice, the Court deliberately utilized its opinion in that case as a means of removing misapprehensions that had arisen with reference to one of its former opinions *(McIntyre* v. *Chappell*, 4 Tex 187) and to qualify its opinion in such former case in order that the bench and bar of Texas thereafter might not be misled by its apparent holding in *McIntyre* v. *Chappell.*

After a full discussion of the authorities, the Court reached the conclusion that, where a man, domiciled in one state, marries a woman domiciled in another state, and, prior to marriage they agree upon a third state as their matrimonial domicile, even if such agreement did not, ipso facto, fix the domicile of the contracting parties in the new state (which the Court thought possible), nevertheless, their future property acquisitions are to be governed by the laws of the state selected as their matrimonial domicile. The Court premised such conclusion on the solid ground that in the case of marriage contracts, as in other contracts, the law of the place where the contract is to be performed should govern all rights arising out of, and incidental to, the contract, including the rights of the respective spouses

in property acquired subsequent to their marriage. It is undisputed in the case at bar that taxpayer and his wife agreed prior to the time of their marriage to make the State of Texas their matrimonial domicile. (R. 20).

In view of the limitations cast by the Supreme Court of Texas in *State* v. *Barrow*, Supra, on its prior decision in *McIntyre* v. *Chappell*, Supra, Respondent was less than frank with this Court in citing *McIntyre* v. *Chappell* (Brief in Opposition, pg. 9) in support of the proposition that decisions of the Texas Courts both earlier and later than *State* v. *Barrow*, Supra, adhere to the dominant rule that physical presence, accompanied by intention to remain, is essential to the creation of a new domicile by choice.

Hogue v. Hogue, 242 S.W. 2d 673 (Tex. Civ. App., 1951) went off on a failure to establish that Hogue ever intended to change his place of residence within the state sufficiently to enable a local state court to obtain jurisdiction in a divorce proceeding. Nor do the remaining authorities cited at page 9 of the Brief in Opposition, support Respondent's position in this case because they deal with military personnel on active military duty, and in substance hold that mere residence under compulsion of military orders is not the type of residence required to establish a new domicile of choice, although, even under such circumstances, a new domicile of choice can be established by appropriate evidence establishing an intent to make the locus of the military service the service man's future permanent home. The cited cases do support the

proposition that, once established, domicile, whether of origin or of choice, is not lost by temporary absence under compulsion of military orders.

Conclusion

The decision below was wrong. In deciding the case as it did, the Court of Appeals went counter to decisions of this Court and its own decisions, ignored a decision of the Supreme Court of Texas settling the property rights on which a correct decision below necessarily turned, and its decision tends to undermine the results of the years of research and effort devoted to the American Law Institute's *Restatement of the Conflict of Laws.*

For the reasons stated, the petition for a writ of certiorari should be granted.

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